In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-102

JAMES ARTHUR WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner principally contends that the evidence against him was insufficient; that the requirement that a retail liquor dealer pay a special federal tax violates the privilege against self-incrimination; and that his privilege against self-incrimination was violated by the admission into evidence of business records seized incident to a warrant search.

After a jury trial in the United States District Court for the District of Kansas, petitioner and his two co-defendants, Sarah Ramey and John Sanders, were convicted on three counts of conspiracy in violation of 18 U.S.C. 371 and substantive violations of 26 U.S.C. 5691(a) for willful non-payment of the special tax imposed on retail dealers in liquor by 26 U.S.C. 5121(a). Petitioner was sentenced to concurrent prison terms of eighteen months on each count subject to early parole eligibility

under 18 U.S.C. 4208(a)(2).[1] The court of appeals affirmed in a *per curiam* opinion (Pet. App. A1-A4).

The evidence at trial showed that in the summer and fall of 1971 petitioner and his co-defendants conducted retail operations selling liquor by the drink at the Swingers Club and the Casa Blanca Club, two ostensibly private clubs in Kansas City, Kansas.[2] The Swingers Club, which had an adjacent restaurant owned by petitioner, known as the Bar-B-Q House, was licensed as a private club in Sanders' name. Petitioner, a Missouri resident, was ineligible to obtain a private club license under Kansas law (Vol. I, 66-67, 330;[3] Kan. Stat. Annot. 41-2623). Nevertheless, he was the principal operator of both clubs. Petitioner operated the Casa Blanca Club during the summer and fall of 1971 and gave all the orders to employees (Vol. I, 237-239, 255-256). On September 22, 1971, he admitted to two Internal Revenue Service agents that he was the manager of the Casa Blanca (Vol. I, 132-134, 206-208). On September 28, 1971, he referred to the Casa Blanca as his "other club" in a conversation with an undercover agent at the

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[1] Ramey and Sanders received suspended concurrent terms of a year and a day on each count and were placed on probation for two years.

[2] Under Kansas state law, the sale of liquor by the drink is prohibited (Kan. Const. Art. 15, Sect. 10; Kan. Stat. Ann. 41-803). Class B private clubs which provide set-ups for members who bring their own liquor are permitted, but these clubs may not purchase liquor for their members or keep liquor which is not marked with a member's name (Kan. Stat. Ann. 41-2601 and 41-2602). No person holding a class B license may receive a second license (Kan. Stat. Ann. 41-2646). Class B licenses are subject to revocation if the licensee club purchases a federal retail liquor stamp (Kan. Stat. Ann. 41-2611(f)).

[3] References are to the five-volume Record in the court of appeals.

Swingers Club (Vol. I, 151-152, 181). He served as a bartender at the Casa Blanca on at least one occasion (Vol. I, 273, 162-165). Several times he ordered whiskey by telephone from a local liquor store, gave a Casa Blanca employee money (as much as $200) to pay for it, and then sent the man to pick the whiskey up and bring it to the Casa Blanca's Bar (Vol. I, 240-243).

Petitioner also managed the Swingers Club (Vol. I, 243) and served as the bartender there on at least four occasions (Vol. I, 31-33, 38-39, 45-50). On September 22, 1971, he admitted to two Internal Revenue agents that he managed the Swingers Club (Vol. I, 132-134, 206-208). On September 30, 1971, he gave two women at the Casa Blanca Club directions to "his other club," the Swingers. In the same conversation, an associate of petitioner told the women in petitioner's presence that petitioner was the proprietor of the Swingers Club (Vol. I, 158-159). On August 28, 1971, he accepted compliments from customers who commented on how nice the newly-opened Swingers Club looked. He also told an undercover agent that he and his brother had done the work in fixing up the Swingers Club (Vol. I, 123-124). The Club was connected to petitioner's Bar-B-Q House by a swinging door and food from the Bar-B-Q House was served to Club patrons (Vol. I, 52-53, 32-33, 49-50, 58-60). On one occasion petitioner brought two bottles of vodka to the Swingers Club and on another occasion he took his keys and left to obtain more scotch (Vol. I, 50-51, 152-153). In late August 1971 he purchased $1,100 worth of liquor from a local retailer, allegedly for a grand opening party for his barbecue restaurant (Vol. I, 304-307).

Petitioner signed the checks, paid the bills, and paid employees of both the Casa Blanca and the Swingers

Club (Vol. I, 321-330, 230-233, 244, 255-256, 268-269). Several of these employees worked at both clubs, depending upon where they were most needed (Vol. I, 25, 32-33, 146-148, 153-154, 161-165, 195, 245, 281-283).

On nine separate occasions in August, September, and October of 1971, undercover agents of the Alcohol, Tobacco and Firearms Division of the United States Treasury Department purchased alcoholic mixed drinks at the Casa Blanca Club and the Swingers Club, both of which were being operated as regular bars serving liquor by the drink to customers (Vol. I, 23-65, 146-173). The agents testified that petitioner was frequently present when drinks were being sold and that on occasion he tended bar.

On September 22, 1971, two Internal Revenue agents entered the Swingers Club and asked to see the manager. They were informed by petitioner that he was the manager of the Club and that John Sanders was the owner. Petitioner also advised them that he managed the Casa Blanca Club. The agents informed petitioner that if liquor was being sold by either club, a federal retail liquor dealer tax stamp had to be purchased for that club. Petitioner replied that liquor was not being sold at either place and that he knew the federal tax requirements (Vol. I, 132-135, 206-209, 213-215, 220-221).

It was stipulated that no federal liquor tax stamp was purchased for either club for the period covered by the indictment (Vol. I, 321).

On Saturday, October 30, 1971, federal agents raided the Casa Blanca Club and the Swingers Club pursuant to search warrants obtained that morning from the local United States Magistrate. Among the items seized in the two searches were numerous bottles of liquor, bar equipment, various mixes, cash and file boxes, and

certain business records such as check books, receipts, bills, and time cards. Records for the Casa Blanca Club were seized at the Swingers Club (Vol. I, 329-330).

1. The evidence was more than ample to support the jury's verdict. It established that liquor was sold at both clubs; that petitioner was the principal operator of both clubs and paid and directed the employees; that petitioner purchased liquor which was brought to the Casa Blanca Club; and that petitioner was frequently present when drinks were being sold, occasionally tending bar.[4]

2. The requirement that dealers in liquor must pay a special federal tax (26 U.S.C. 5121(a), 5691(a)) does not violate the privilege against self-incrimination, notwithstanding that Kansas state law prohibits the sale of liquor by the drink.[5] The courts have consistently rejected the self-incrimination defense in prosecutions for violation of the federal liquor tax laws. See *United*

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[4] Petitioner's challenge to the jury instructions (Pet. 8-10) is without merit. State law concerning private clubs had no bearing on whether the federal violations had occurred. The trial court gave a thorough explanation of "reasonable doubt" (Vol. I, 425-426), referring to it in traditional terms. See *Holland* v. *United States*, 348 U.S. 121, 140. The jury was properly told that it should convict only if convinced beyond any reasonable chance of mistake that the defendant was guilty. It was also told that before it could convict, it had to find that the defendant was a proprietor of the liquor retail business or one who knowingly aided and abetted evasion of the tax other than in the capacity of an employee of the proprietor (Vol. I, 435-436).

[5] Petitioner's self-incrimination argument principally relies on the requirement that the liquor tax stamp be conspicuously displayed in the place of business (26 U.S.C. 6806) (Pet. 3). This statute is not in issue here. Petitioner was convicted for failure to pay the tax (26 U.S.C. 5121(a), 5691(a)), not for failure to display the stamp.

States v. *Curry*, 428 F. 2d 785 (C.A. 9); *United States* v. *Hunt*, 419 F. 2d 1 (C.A. 3), certiorari denied, 397 U.S. 1016; *United States* v. *Walden*, 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *Wilson* v. *United States*, 409 F. 2d 604 (C.A. 5), certiorari denied, 395 U.S. 923.

The federal tax statute in question is a legitimate revenue measure directed at a lawful industry operating on a national scale. Unlike the marijuana or gambling taxes, liquor taxation is not directed to a "selective group inherently suspect of criminal activities," but is rather "an essentially non-criminal and regulatory area of inquiry." See *Leary* v. *United States*, 395 U.S. 6, 16-18; *Marchetti* v. *United States*, 390 U.S. 39, 57; *Grosso* v. *United States*, 390 U.S. 62, 64; *Haynes* v. *United States*, 390 U.S. 85, 98-99. The enforcement of a legitimate federal revenue measure cannot be undercut because an individual may desire to operate in contravention of some state law.

3. Petitioner contends that the business records seized pursuant to a valid search warrant and introduced into evidence violated his privilege against self-incrimination (Pet. 7). The court of appeals did not consider this contention because it had not been properly raised below (Pet. A2-3).

In any event, the contention is without merit. The materials seized consisted of business records such as check books, receipts, bills, and time cards. These records of an illegal liquor business are physical non-testimonial evidence to which the Fifth Amendment privilege does not apply. See *United States* v. *Hanon*, 428 F. 2d 101, 106-107 (C.A. 8) (records of illegal gambling business), certiorari denied, 402 U.S. 952. As this Court has noted: "A 'book' which is no more

than a ledger of an unlawful enterprise * * * might stand on a quite different constitutional footing from the books * * * [that reflect thoughts, opinions, beliefs, or mere predilections of their possessors]." *Stanford* v. *Texas*, 379 U.S. 476, 485, n. 16.

Petitioner relies on *Hill* v. *Philpott*, 445 F. 2d 144 (C.A. 7), certiorari denied, 404 U.S. 991. In *Hill*, thirty-five cartons containing a physician's private books, papers and records, including the medical records of his patients, were seized on the basis of a valid search warrant issued pursuant to an investigation for tax evasion. *Hill* rejected the long-recognized distinction between records sought by subpoena and records sought by search warrant. But the difference is critical: the search warrant does not compel the actual or potential defendant to produce documents and identify them as those described in the subpoena. *United States* v. *Blank*, 459 F. 2d 383, 385 (C.A. 6), certiorari denied, 409 U.S. 887. As Mr. Justice Holmes wrote: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U.S. 457, 458. Only last Term, this Court reaffirmed this statement and the principle that the privilege against self-incrimination only extends to coercion exerted directly on the accused in order to force him to produce incriminating documents. *Couch* v. *United States*, 409 U.S. 322, 328-329. When non-testimonial evidence is seized pursuant to a valid search warrant the privilege is not violated.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General

SEPTEMBER 1973.

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